of censorship in the United States, including in particular efforts to suppress creative expression and information about sexuality and sexual orientation.

People for the American Way ("People For") is a non-partisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights, including first amendment freedoms. Founded in 1980 by a group of religious, civic and education leaders devoted to our nation's heritage of tolerance, pluralism and liberty, People For now has over 300,000 members nationwide. Many of People For's members subscribe to cable television and watch programs on PEG and leased access channels. People For's members have specific and personal interests in promoting the free flow of information and in receiving uncensored cable programming. People For seeks to protect the interests of its members, as well as the broader interest in preventing censorship of expression protected by the first amendment.

Although the commenters generally support the goal of protecting unsupervised children from cable programming that their parents find inappropriate, we cannot support the Commission's Proposed Rule. The content-based restrictions that the Commission proposes will prove seriously disruptive to access programming and the value that it brings to local communities across the country. Moreover, the Proposed Rule will work this mischief without adding anything to the already effective requirement that cable operators provide lockboxes to protect unsupervised children.

First, the PEG restriction on "material soliciting or promoting unlawful conduct" presents special problems for programming that engages in core political speech.[2/] For example, in Grand Rapids, Michigan, the producers of "Lies of Our Times" have endorsed sanctuary for Latin American refugees and encouraged blockades of government offices in protest of various official positions. Similarly, "The Flying Focus Video Collective" of Portland, Oregon has hosted a speaker who advocated direct and illegal action to protect old timber growth. Several programs have advocated the de-criminalization of marijuana, including "Libertarian Conspiracy" of Sacramento, California, "Libertarian Review" and "Time for Hemp" in Tucson, Arizona, and "Cannabis" in Kalamazoo, Michigan. Patricia Aufderheide, Public Access Cable Programming, Controversial Speech, and Free Expression, 4-5 (Nov. 1992) [hereinafter Public Access] (App., Exh. L).

Second, the restriction on sexually explicit programming would curtail programming on health education and sex education, including programs that deal frankly with AIDS. This would include programming directed at both the gay minority and heterosexuals.

Examples of each of these types of programming are literally too extensive to document here. For example, Cambridge Community Television in Massachusetts could be faced

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[2/] The description that follows is based in very large measure on Public Access Cable Programming, Controversial Speech and Free Expression, a draft article by Dr. Aufderheide, that is included in the Appendix as Exhibit L.

with restrictions on a program entitled "Truth or Consequences: A Guide to Safe Sex at MIT." Id. at 4. So could Kalamazoo Community Access Center of Michigan for an AIDS prevention special that involved role-playing. Id. Similarly, the Northern Virginia Youth Services Coalition produces the weekly cable access series, "Focus on Youth." In one program on AIDS, two professionals role-playing a dating situation were asked, "If you were dating, how would you get your partner to reveal his sexual history?" Cable Access, supra, at 49.

A video of a home birth in Amherst, Massachusetts might have fallen under scrutiny, as might have "Desperately Seeking Susan," a program in Olympia, Washington that is hosted by a therapist and includes frank discussion of sexual behavior and sexual dysfunctions. Public Access, supra, at 4. The same is true for the "HealthVisions" series, produced by the community and professional education department of Good Samaritan Hospital and Medical Center of Portland, Oregon. Programs in the series have included "PMS: Breaking the Cycle" and "Understanding Impotence: A Common and Treatable Problem." Cable Access, supra, at 37.

Moreover, some programs would face restrictions under either or both of the "unlawful" and "explicit" standards. For example, access centers in Forest Park Ohio, Fort Wayne, Indiana, Sacramento, California, Kalamazoo, Michigan, and Portland, Oregon have aired programs, some produced by Operation Rescue, that have opposed abortion. Some of these

programs have either encouraged blocking access to abortion clinics or have contained possibly offensive explicit images, or both. Public Access, supra, at 5.

Finally, live programming, including call-in programs, will be particularly hindered by the Commission's proposed Rule. These shows fulfill a unique role by both making cable immediately interactive and allowing disparate minority groups to communicate with each other through that medium. It is in the nature of these programs to be unpredictable, however, especially when they concern sensitive or hotly-debated topics. Because programmers of these types of shows cannot assure operators of their content, the fear of liability is especially likely to prompt their prohibition.

Several shows concerning sex education could thus be hampered. For example, one segment of "AIDS Call-in Live," from Chicago, included a seventeen-year-old girl asking how to respond to a boyfriend who assured her that they did not need to use condoms because he was loyal to her. Speakers may also hold up items such as condoms to explain their use. Id. at 8.

Health education shows could also have the same problems. For example, "Health in America" is produced monthly in Sacramento and discusses alternative and holistic health-care options. It has included graphic images of women with mastectomies and damaged breast implants. Id. at 8.

Finally, topical call-in programs would also be threatened. Sacramento aired "Live Wire" within hours of the Rodney King verdict, on which callers had their volatile

moments. And access programs in Oregon hotly debated that state's ballot initiative that would have criminalized some homosexual behavior. Id. at 5, 8.

No one can dispute the value of these programs to an adult viewing audience. Even if some parents feel that unsupervised minors should not be given free access to all of them, it ill serves society to reduce adults to viewing cable that is only fit for children. For that reason, we see lockboxes as the alternative that is superior to allowing the prohibition of this type of programming. Lockboxes allow adults both to control children's access and to partake of the robust speech and debate being aired on access channels. They also allow parents to decide for themselves whether or not their children will benefit from receiving information on sensitive topics, and they allow access to be granted for just the space of one program. Bans and blocking schemes offer none of these advantages, yet the congressional record and the Commission's Notice both disclose that hardly a whisper of attention has been paid to the lockbox option.

I. SECTION 10 VIOLATES THE FIRST AMENDMENT

There can be little doubt that the purpose and effect of Section 10 of the Act is to establish a system of censorship that violates the first amendment rights of those who wish to cablecast on PEG and leased access channels and those who wish to view the censored programming. As such, if the Commission is to implement this section of the Act in haec verba (as its Proposed Rule suggests), any final rule that it may promulgate

in these proceedings will itself be unconstitutional. We discuss the various constitutional difficulties that the Commission's Proposed Rule presents in the sections that follow this one.

This section focuses on the statute itself, and our purpose is twofold. First, we demonstrate the propriety of applying first amendment analysis to the content-based restrictions on free expression that are either enshrined in Section 10 or called for by it. Second, we show that Section 10's regulation of non-obscene cable programming is necessarily unconstitutional.

A. STATE ACTION

As an initial matter, we are aware of certain statements in the floor debates concerning Section 10 that attempt to categorize the restrictions on speech contained in that enactment as non-governmental and hence beyond constitutional scrutiny. See, e.g., 138 Cong. Rec. S646 (daily ed. Jan. 30, 1992) (statement of Sen. Helms); id. at S648 (statements of Sen. Thurmond); id. at S649 (statement of Sen. Inouye). In our view, these statements are clearly mistaken.[10/] As a general matter, Congress' role in establishing this system of censorship (as well as that of the Commission in implementing

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[10/] Other floor statements clearly indicate that sponsors of Section 10 impermissibly intended "to forbid cable companies" from allowing programmers to freely express themselves over PEG and leased access channels. 138 Cong. Rec. S646 (daily ed. Jan. 30, 1992)(statement of Sen. Helms). See also id. at S652 (imposition of liability on cable operators "will put an end to the kind of things going on" access channels).

it) involves sufficient government action to implicate the protections of the first amendment. Access channels are public fora that have been created by localities through contracts between franchising authorities and cable operators. Pursuant to these contracts, local cable operators are prohibited from censoring access programming. Through Section 10, Congress seeks to interfere with these contracts by authorizing censorship through its chosen agents, the cable operators.

Moreover, two features of this regulation demonstrate the state's ongoing involvement in the system of censorship that Section 10 establishes. First, Congress has specified that, in all instances, leased access programming must be blocked if it constitutes "indecent programming, as defined by Commission regulations." Section 10(b) (codified at 47 U.S.C. § 532(j)(1)). This provision is an integral part of Section 10's system of censorship, and it indicates that Congress has fully involved itself and the Commission in placing restrictions on programming under the Act. As such it is direct state involvement that suffices to trigger first amendment scrutiny of the entire enactment.[11/] Further, Section 10(b) indicates that Congress viewed the censorship of cable programming as a function of the state, and its delegation of

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[11/] Because "[t]he more relevant inquiry in evaluating severability is whether the statute will function in a manner consistent with the intent of Congress," Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 685 (1987) (emphasis in original), the state action that adheres in the blocking provisions of subsection (b) cannot be severed from the rest of the statute.

a part of that power to a private actor does not insulate the exercise of that power from constitutional scrutiny. See, e.g., Williams v. City of St. Louis, 783 F.2d 114, 117 (8th Cir. 1986) ("This delegation under state law of powers possessed by virtue of state law and traditionally exercised by the City satisfies us that the City's action here is under color of state law."); Ancata v. Prison Health Servs., Inc., 769 F.2d 700, 703 (11th Cir. 1985) ("Where a function which is traditionally the exclusive prerogative of the state . . . is performed by a private entity, state action is present.").

Second, it is Congress in all instances that has specified what type of programming an operator may refuse to carry over PEG or leased access, otherwise mandating that "a cable operator shall not exercise any editorial control" over the programming of these channels. 47 U.S.C. § 531(e) (PEG); 47 U.S.C. § 532(c)(2) (leased access). This congressional specification of programming standards is not insulated from first amendment scrutiny merely because it is phrased in permissive terms, for it operates in tandem with Section 10(d)'s imposition of liability on private censors if they fail to prohibit speech that "involves" obscenity. In other words, these provisions place the operator in peril of liability and prompt it to restrict any programming that even remotely meets the permissive censorship standards set out in subsections (a) and (c) of Section 10, lest the speech also wander into the undefined grey area that "involves obscene material." Cf. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 67 (1963)

(cautioning against elevating form over substance when determining whether censorship is occurring); Penthouse Int'l. Ltd. v. McAuliffe, 610 F.2d 1353, 1360 (5th Cir.) (same), cert. dismissed, 447 U.S. 931 (1980).

This effect has already been felt.[12/] For example, as the Chairman and Chief Executive Officer of Time Warner Cable ("TWC") concluded in an affidavit that was submitted in litigation that brought a direct challenge to the 1992 Act:

> "The provision of Section 10(d) . . . injur[es] TWC by subjecting it to the risk of criminal and civil liability for programming created by others that it does not wish to carry but is required by law to carry. The provisions . . . of the Cable Act permitting TWC to prohibit or restrict obscene programming does not alleviate such injury in that they compel TWC to determine obscenity questions that even Federal courts regard as exceedingly difficult, and TWC remains exposed to criminal or civil liability if a court later disagrees with its determination." Affidavit of Joseph J. Collins, ¶ 37, at 23 (App., Exh. M).

Cable operators thus feel compelled by their possible liability to censor widely.

Indeed, cable operators have for that reason already begun to institute censorship for programming that is sexually explicit but not even arguably indecent, out of fear that some

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12/ Of course, the threat of liability is sufficient for state action purposes; it need not be the case, as here, that such a threat has proven to be the direct cause of private conduct. Peterson v. City of Greenville, 373 U.S. 244, 248 (1963) (finding state action "even assuming . . . that the manager would have acted as he did independently of the existence of the ordinance"); Carlin Communications, Inc. v. Mountain States Tel. & Tel. Co., 827 F.2d 1291, 1295 (9th Cir. 1987) ("Simply by 'command[ing] a particular result,' the state had so involved itself that it could not claim the conduct had actually occurred as a result of private choice."), cert. denied, 485 U.S. 1029 (1988).

such program might later be found to subject the operators to liability. As one cable operator wrote to the executive director of its local public access programmer,

> "all programming which contains sexual, excretory or other behavior or depictions, or language which potentially may be offensive to the citizens of Tucson [must] be sent to our system for screening before it is cablecast by TCCC over our cable system." Letter from InterMedia Partners to Tucson Community Cable Corp. (Nov. 13, 1992) (App., Exh. N).

Thus, not only is programming called in to question if it concerns sexual material of any nature, it is also subject to editorial scrutiny if it contains "potentially . . . offensive" language. Because of their unpredictable nature and potential to include such language, cable operators have specifically targeted live programming (including call-in shows):

> "Moreover, no live programming should be cablecast which contains such material. All such programming should be taped and sent to us for screening as outlined above." Id.

Recognizing the obvious dangers posed by the threat of government-imposed liability on private censors, federal courts faced with similar schemes have not hesitated to recognize the state action that brings first amendment principles to bear. For example, in Carlin Communications, Inc. v. Mountain States Telephone & Telegraph Co., 827 F.2d 1291 (9th Cir. 1987), cert. denied, 485 U.S. 1029 (1988) Arizona's threat of criminal liability constituted sufficient state action to subject to first amendment scrutiny a telephone company's decision to bar sexually explicit

messages. "With this threat, Arizona 'exercised coercive power' over Mountain Bell and thereby converted its otherwise private conduct into state action . . . ." Id. at 1295 (quoting Blum v. Yaretsky, 457 U.S. 991, 1004 (1982)).[13/] Similarly, the threat of liability contained in Section 10(d) of the 1992 Act transforms the censorship standards of Sections 10(a) and (c), which are otherwise phrased in permissive terms, into state action.

Indeed, the existence of subsection (d) nullifies the state action arguments advanced in the floor debates on Section 10. Subsection (d) was not a part of the enactment then being debated, but was later added as a "conforming amendment." It is "conforming," however, only in the sense that it requires cable operators to conform to censorship standards that are otherwise phrased in permissive terms. In later proposing the addition of subsection (d), Senator Helms specifically stated that its purpose was to "put an end to the kind of things going on" access channels.[14/] Given this

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[13/] The court went on to hold that any decision to ban speech made under threat of state-imposed liability "was unconstitutional state action" that violated the first amendment. 827 F.2d at 1296.

[14/] In its Notice of Proposed Rulemaking, the Commission recognized the symbiotic relationship between the programming standards of subsections (a) and (c) and the imposition of liability contained in subsection (d). For example, Paragraph 13 first notes that subsection (c) "merely allows the cable operator the option" of censoring PEG. The next sentence immediately juxtaposes

(continued...)

change in circumstances, it is not surprising to find inapposite the federal cases cited in the floor debate for the proposition that the censorship being enacted would escape constitutional scrutiny. For example, Senator Helms pointed to Carlin Communication, Inc. v. Southern Bell Telephone & Telegraph, Inc., 802 F.2d 1352 (11th Cir. 1986), to support his contention that "it is permissible to allow a private company to make independent decisions to exclude certain objectionable material." 138 Cong. Rec. S646 (daily ed. Jan. 30, 1992) (emphasis added). As others have readily recognized, however, the threat of liability removes the independence of that decision and renders it subject to first amendment scrutiny. See, e.g., Mountain States, 827 F.2d at 1295; id. at 1298 n.2 (Canby, J., dissenting in part) ("the presence of this coercion differentiates this case from Carlin v. Southern Bell").

B. PUBLIC FORUM

Even were the censorial dictates of Section 10 not themselves state action, the first amendment would still apply. Because PEG and leased access constitute a quintessential

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14/ (...continued)
"As pointed out earlier, however, [subsection (d)] expressly provides that cable operators are no longer statutorily immune from liability for carriage of obscene materials on these channels."

However, we note that the legislative history of subsection (d) suggests that liability cannot be imposed on cable operators with respect to PEG. The scant floor debate was concerned wholly with leased access channels. 138 Cong. Rec. S652 (daily ed. Jan. 30, 1992) (statement of Sen. Helms).

public forum, a system of censorship is not insulated from the first amendment simply because Congress has vested private cable operators with the decision to prohibit speech in that forum. When the government destroys a public forum by empowering private actors to restrict speech, it must do so within the bounds of the first amendment.

PEG and leased access certainly constitute such a public forum -- one that is unique because of the widespread reliance on electronic communication. Congress recognized this status in the legislative history of the 1984 Act, which both recognized that local franchising authorities could provide for PEG in franchises and required them to establish leased access. See H.R. Rep. No. 934, 98th Cong., 2d Sess. 30 (1984), reprinted in 1984 U.S.C.C.A.N. 4655, 4667 (quoted supra page 4). The legislative history of the 1992 Act similarly recognizes that Congress has heretofore "requir[ed] cable operators to operate public and leased access channels as a public forum open to any and all speakers." 138 Cong. Rec. S648 (daily ed. Jan. 30, 1992) (letter from Mr. Peters); id. at S652 (statement of Sen. Helms) ("[T]he intent of the [1984] law, obviously, was to promote diversity in cable programming. The law required cable operators to carry anything that programmers brought along."). In sum, "the underlying theory of leased access channels [is] to provide a forum for people to speak out on a diversity of issues." Id. (statement of Sen. Thurmond). See also S. Rep. No. 381, 101st Cong., 2d

Sess. 46 (1990) (PEG and leased access constitute "a free market of ideas").

Under generally applicable first amendment principles, therefore, localities that implement these provisions pursuant to their franchising authority have purposefully "'open[ed] a nontraditional forum for public discourse'" and created a public forum "that has as 'a principal purpose . . . the free exchange of ideas.'" International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701, 2706 (1992) (quoting Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 800, 802 (1985)).[15/] The federal courts have thus recognized that PEG and leased access constitutes a public forum for purposes of first amendment analysis.[16/]

[15/] See also Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 555 (1975) (finding municipal auditorium a public forum); Cinevision Corp. v. City of Burbank, 745 F.2d 560, 570 (9th Cir. 1984) (same for amphitheater), cert. denied, 471 U.S. 1054 (1985); Yurkew v. Sinclair, 495 F. Supp. 1248, 1252 n.5 (D. Minn. 1980) (state fair grounds); United States Labor Party v. Knox, 430 F. Supp. 1359, 1361-62 (D.N.C. 1977) (parking areas adjoining state-owned liquor stores).

[16/] See, e.g., Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1452 (D.C. Cir. 1985) ("access rules ... serve countervailing First Amendment values by providing a forum for [the] public"), cert. denied, 476 U.S. 1169 (1986); Muir v. Alabama Educ. Television Comm'n, 656 F.2d 1012, 1022 & n.19 (5th Cir. Unit B 1981); Erie Telecommunications, Inc. v. City of Erie, 659 F. Supp. 580, 598-600 (W.D. Pa. 1987) ("access requirements are intended to make cable channels available to the public on a first-come, first-served nondiscriminatory basis"). See also Berkshire Cablevision of Rhode Island, Inc. v. Burke, 571 F. Supp. 976, 987 (D.R.I. 1983) (access rules "mandate that all individuals be given the opportunity to appear on cable television on a nondiscriminatory first-come, first-served basis"), vacated as moot, 773 F.2d 382 (1st Cir. 1985).

Because of the recognition that access channels are a public forum, as at least one commentator has noted, "for the access channels, the 1984 Act regards the cable system as the modern counterpart to the city street or, perhaps more precisely, to the streets in a company town." Michael I. Meyerson, The Cable Communications Policy Act of 1984: A Balancing Act on the Coaxial Wires, 19 Ga. L. Rev. 543, 585 (1985). Attempts by private operators to now forbid expression upon channels that have previously been dedicated as a public forum are therefore subject to first amendment analysis, just as first amendment scrutiny is necessary when the private owner of a company town attempts to deny others the right to speak on nominally private sidewalks. Marsh v. Alabama, 326 U.S. 501, 507-08 (1946). "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." Id. at 506. Cf. International Soc'y for Krishna Consciousness v. State Fair of Tex., 461 F. Supp. 719 (N.D. Tex. 1978) (enjoining restrictions placed by non-profit corporation on religious expression being pursued in a public forum).

In a situation remarkably similar to that presented by Section 10, it was an access channel's status as a public forum that prompted a federal court to apply first amendment analysis to a scheme of permissive private censorship. Missouri Knights of the Ku Klux Klan v. Kansas City, Mo., 723 F. Supp. 1347 (W.D. Mo. 1989). The Kansas City case arose

after members of a racist organization declared their intention to air a program over a public access channel. In reaction, the city council passed an ordinance that "permitted [the local cable operator] to delete the cable channel if it so desired." Id. at 1350. In its stead, "a new channel would be created" that "would be subject to [the operator's] editorial control." Id. Recognizing that the introduction of permissive editorial control would have intruded upon a public forum, the court denied a motion for summary judgment that would have eliminated a first amendment claim. It held that "[a] state may only eliminate a designated public forum if it does so in a manner consistent with the First Amendment." Id. at 1352.[17] Because Section 10 and the Commission's proposed regulations thereunder would similarly allow cable operators to impinge upon the PEG and leased access public forum, they are proper objects of scrutiny under the first amendment.

C. FIRST AMENDMENT VIOLATIONS

We have shown above that Section 10 does not escape first amendment scrutiny. Moreover, under standards applicable to content-based cable regulations, Section 10 is unconstitutional. As the Commission has recognized in this docket, see Notice ¶ 7, at 4, differences in the characteristics of the

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[17] See also United States v. Grace, 461 U.S. 171, 180 (1983) ("the destruction of public forum status . . . is at least presumptively impermissible" under the first amendment). Cf. United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 133 (1981) ("Congress, no more than a suburban township, may not by its own ipse dixit destroy the 'public forum' status of streets and parks which have historically been public forums.").

various print and electronic media mandate different standards of first amendment protection against content-based regulation of expression pursued over each such medium. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969). "Each method of communicating ideas is a 'law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method." Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 501 (1981) (quoting Kovacs v. Cooper, 336 U.S. 77, 97 (1949)). Attention to the peculiarities of each medium is therefore necessary when it comes to scrutinizing attempted government regulation of speech that, while not obscene, may be sexually explicit.[18/]

Thus, while the legislative history of Section 10 discloses an intent to import content-based regulations that may be appropriate for other media into cable, see, e.g., 138 Cong. Rec. S646-47 (daily ed. Jan. 30, 1992) (statement of Sen. Helms) (referring to restrictions on telephone communications), such importation does not satisfy the first amendment. Rather, because the unique features of cable have allowed Congress to require that operators make lockboxes available, federal courts have found that federal law already mandates the least restrictive means available to effectively

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18/ Compare FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) (concerning indecency standards applicable to broadcast) with Sable Communications v. FCC, 492 U.S. 115, 127 (1989) ("[t]he private commercial telephone communications at issue here are substantially different from the public radio broadcast at issue in Pacifica") and Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 74 (1983) (distinguishing receipt of sexually explicit mail from broadcast).

curbing the exposure of unsupervised children to sexually explicit, non-obscene cable programming. For that reason, Section 10's content-based restrictions violate the first amendment.

First, unlike broadcast, cable does not involve a "captive audience" -- precisely the basis on which the Supreme Court in Sable Communications v. FCC, 492 U.S. 115, 127-28 (1989), distinguished the telephone communications it was concerned with from the broadcast at issue in Pacifica. It was also on this basis that federal courts have stricken local cable regulations that, like Section 10, seek to limit sexually explicit programming. Thus, in Community Television v. Roy City, 555 F. Supp. 1164 (D. Utah 1982), the court invalidated a local ordinance that sought to regulate indecent cable programming, reasoning that all cable viewers must subscribe to the service and retain the power to cancel that subscription. The court held that cable subscribers must specifically choose to invite cable programming into their home, and it therefore found inapplicable the captive audience rationale that supports the regulation of broadcast indecency. Id. at 1168-69. It was in part on the same basis that the Eleventh Circuit declared a similar ordinance unconstitutional, finding that "[a] Cablevision subscriber must make the affirmative decision to bring Cablevision into his home." Cruz v. Ferre, 755 F.2d 1415, 1419 (11th Cir. 1985). See also Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1448 n.31 (D.C. Cir. 1985) (citing Cruz), cert. denied, 476 U.S. 1169 (1986).

Second, cable presents technologies that provide subscribers even greater control over that service than they have over either broadcast or telephone. Cable is unique in offering subscribers the ability to lock out their children's receipt of specific channels that might otherwise be objectionable, just as parents may place the liquor cabinet under lock and key. Indeed, federal law mandates that all cable operators make available to their subscribers just such lock boxes. 47 U.S.C. § 544(d)(2)(A). Thus, in finding unconstitutional a local restriction on sexually explicit programming, the Eleventh Circuit made special note of the "parental manageability of cable television" afforded by "the ability to protect children" through the use of a "'lockbox' or 'parental key'" available from Cablevision. Cruz, 755 F.2d at 1415, 1420. See also Quincy Cable TV, 768 F.2d at 1448 n.31.

Because cable subscribers are not a captive audience and may use lockboxes to further control access to their service, additional restrictions on non-obscene cable programming are unnecessary and therefore violative of the basic first amendment principle that any restriction on speech must be narrowly tailored to achieving a compelling government interest. See Carey v. Brown, 447 U.S. 455, 461 (1980). See generally infra Section II. It was on this basis that the court in Home Box Office, Inc. v. Wilkinson, 531 F. Supp. 987 (D. Utah 1982), invalidated on first amendment grounds a Utah statute forbidding cable operators from knowingly distributing indecent

programming, despite an asserted justification of the protection of minors. The court held that the regulation at issue would also have restricted the adult population to programming suitable for children. Id. at 997.

Because of the unique nature of cable television, we strongly agree with the federal courts that have struck down content-based regulations that were similar to the indecency restrictions contained in Section 10. Federal law already mandates the least restrictive means for effectively curbing the exposure of unsupervised children to sexually explicit cable programming. Section 10 therefore contemplates an unnecessary additional burden on the first amendment rights of PEG and leased access programmers and viewers, and any final rule that mirrors the statute would itself be unconstitutional.

Even if some content-based regulation could pass muster, however, it is clear that the one proposed by the Commission fails to meet constitutional minima. By parroting Section 10, the Proposed Rule incorporates all of the statute's constitutional infirmities. We now turn to an examination of the Commission's Proposed Rule.

II. THE COMMISSION HAS FAILED TO CONSIDER LESS RESTRICTIVE MEANS TO IMPLEMENT RESTRICTIONS CONTAINED IN ITS PROPOSED RULE

In order to comport with the first amendment, the content-based restrictions contained in the Commission's Proposed Rule must both further a governmental interest that is compelling and do so by the least restrictive means. Sable

Communications v. FCC, 492 U.S. 115, 126 (1989); Gibson v. Florida Bar, 798 F.2d 1564, 1569 (11th Cir. 1986), cert. dismissed, 112 S. Ct. 633 (1991). The Commission has failed on both of these scores. It has not sufficiently articulated any underlying government interest in the restrictions it is proposing. Moreover, because it allows a total prohibition against both programming deemed to "promote" unlawful conduct (on PEG) and sexually explicit programming (on PEG and leased access), the Commission's Proposed Rule cannot be considered narrowly drawn to serve a compelling governmental purpose. Carey v. Brown, 447 U.S. 455, 461-62 (1980). Whatever the Commission's purpose, it clearly has no cognizable interest in keeping from adults either sexually explicit material or political programming that may take issue with existing law, which is of course the necessary implication of any total prohibition. Finally, because lockboxes already effectively implement the government's interest in protecting unsupervised children, even the introduction of censorship that is less than an outright ban would fail the least restrictive means test.

First, the Commission has failed to state on the record the compelling purpose that motivates the PEG restrictions contained in subsection (c) of its Proposed Rule. Such an articulation is of course a necessary predicate to determining "if it chooses the least restrictive means to further the articulated interest." Sable, 492 U.S. at 126. As for the leased access restrictions of subsection (a), the Commission

mentions only in passing that it is concerned with "children's exposure to indecent programs" over those channels. Notice, ¶ 9, at 5. Even if that passing reference can be taken as a full statement of the governmental interest being pursued,[12/] the Commission has not developed any record evidence describing the nature and extent of that exposure. Without such a fact finding, any means implemented cannot be considered the least restrictive, because a reviewing court is left without a standard against which to judge the effectiveness of the various options. Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 167-68 (1962) (agency must make findings based on substantial evidence in order that court has something to review). See also Action for Children's Television v. FCC, 852 F.2d 1332, 1341-42 (D.C. Cir. 1988); cf. Sable, 492 U.S. at 126-27.

Second, no government interest can support the complete prohibition against sexually explicit programming on PEG and leased access, which the Proposed Rule allows. While the

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12/ We contend that it cannot be the requisite full statement. In the context of broadcast indecency, the court found that such an articulation came too late when it was not until oral argument that "the FCC's General Counsel, in response to the court's inquiry, clarified the government's interest: it is the interest in protecting unsupervised children from exposure to indecent material; the government does not propose to act in loco parentis to deny children's access contrary to parents' wishes." Action for Children's Television v. FCC, 852 F.2d 1332, 1343 (D.C. Cir. 1988) (emphasis in original). In any event, if the same as yet unarticulated interest motivates the Commission's programming restrictions for cablecast, lockboxes present the superior means of empowering parents to supervise their children however they so choose, as we discuss below.

federal courts recognize that government may at times shield children from some sexually explicit material that is not obscene, that purpose must be served by the least restrictive means towards its effective implementation. Sable, 492 U.S. at 126. Schemes that use child protection as an excuse to keep such material away from both children and adults fall far short of this test. See, e.g., Butler v. Michigan, 352 U.S. 380, 383 (1957) (even when attempting to protect children, regulation cannot effectively reduce adults to having "only what is fit for children"). Regardless of the medium involved, therefore, child protection has failed as an excuse for total bans on sexually explicit material, including books, id., telephone messages, Sable, 492 U.S. at 127-31, unsolicited mail, Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983), and radio and television broadcasts, Action for Children's Television v. FCC, 932 F.2d 1504, 1508-09 (D.C. Cir. 1991), cert. denied, 112 S. Ct. 1281, and cert. denied, 112 S. Ct. 1282 (1992). It is thus not surprising to find that the protection of children has failed as an excuse for previous attempts to prohibit sexually explicit programming from being carried on cable. See Cruz v. Ferre, 755 F.2d 1415, 1420-21 (11th Cir. 1985); Home Box Office, Inc. v. Wilkinson, 531 F. Supp. 987, 997 (D. Utah 1982); Community Television v. Roy City, 555 F. Supp. 1164, 1166 & n.8 (D. Utah 1982).

Finally, the Commission's Proposed Rule would fail the least restrictive means test even if it did not allow opera-

tors to ban all sexually explicit or politically sensitive access programming. The Commission has simply failed to show a nexus between a proper governmental purpose and the introduction of editorial control by a cable operator whose incentives bias it against programmers not of their own choosing. See supra pages 2-4 and 9-10. This nexus is especially doubtful because the Proposed Rule does not prevent an operator from either acting arbitrarily, using criteria not narrowly-tailored to the government purpose, or carrying on other of its channels the same types of programming it may be prohibiting from PEG and leased access.[20/]

In contrast to the approach adopted by the Commission's proposed rule, lockboxes present the least restrictive means of controlling the access of minors to programming that their parents find inappropriate, as we show below.[21/] Moreover, cable operators are already required to make lockboxes available to all subscribers. 47 U.S.C. § 544(d)(2)(A). Without a finding that lockboxes are ineffective, therefore, the intro-

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20/ We also note that a least restrictive means requirement can be derived from the PEG and leased access statutes themselves. Even as amended, both state that "a cable operator shall not exercise any editorial control over" an access channel. 47 U.S.C. § 531(c) (PEG); 47 U.S.C. § 532(c)(2) (leased access). In order to keep the narrow amendments of Section 10 from swallowing this larger purpose -- the preservation of a public forum -- those amendments must be narrowly construed. By failing to propose safeguards such as those discussed in text, therefore, the Commission has also acted contrary to the statute.

21/ Examples of several lockbox owner manuals are presented in the Appendix as Exhibit O-Q.

duction of outside editorial control over PEG and leased access programming must be considered an unconstitutionally intrusive means of protecting unsupervised children from sexually explicit programming.

The Commission in the current docket has acknowledged that lockboxes play a role in limiting children's access to cablecast indecency. Notice ¶ 9, at 5 (lockboxes are available to subscribers to "control access to . . . cable services on the system [and] to limit access to [channels carrying indecency] to others in the household"). In other dockets, too, the Commission has spoken directly to the effectiveness of this technique. See, e.g., FCC 85-179, 1985 FCC Lexis 3475, ¶ 132, at *112-13 (Apr. 11, 1985) ("Indeed, we believe that the provision for lockboxes largely disposes of issues involving the Commission's standards for indecency, and would also be a significant factor in cases related to obscenity and similar offensive programming.") (footnote omitted). Thus, when discussing techniques for reducing children's exposure to broadcast indecency, the Commission specifically noted that:

> "Technical means are available to block children's access to indecent cable programs . . . . Upon request, cable operators must provide a device such as a 'lock-box' or 'parental key' that permits a subscriber to restrict access to selected programming . . . . [Lockboxes] can restrict access by children whether or not parents are physically present and actively supervise." FCC 90-264, 5 F.C.C.R. 5297, 5305 (1990).

The Commission has not been alone in recognizing the effectiveness of lockboxes. Congress, too, has recognized both that lockboxes effectively screen indecency and that they